Appellate Review of MERC Decisions
January 2000 – May 2001
Roy L. Roulhac, Administrative Law Judge
Michigan Employment Relations Commission

Duty to Provide Information - Internal Affairs Files - Freedom of Information and Employee Right to Know Acts

Kent County Deputy Sheriffs Ass'n v *Kent County Sheriff and Kent County,* 463 Mich App 353 (September 19, 2000). In an earlier proceeding between the same parties, 1991 MERC Lab Op 374, the Commission held that the employer's internal investigative reports fell within a confidential information exception that did not have to be disclosed to the union because their release would destroy or diminish the employer's ability to conduct internal affairs investigations. The instant dispute involves the union's attempt to obtain internal affairs files and witness statements to use in arbitrating grievances filed on behalf of two guards who were disciplined in 1995 and 1996. Rather than filing an unfair labor practice charge under PERA to compel the employer to release its internal investigation reports, the union filed a lawsuit in circuit court under the Freedom of Information (FOI) and the Employee Right to Know (ERK) Acts. The trial court's grant of the union's summary judgment motion regarding its FOIA claim was overturned by the Court of Appeals, 238 Mich App 310 (1999).

The Supreme Court affirmed, but disagreed with the Court of Appeals' finding that the circuit court lacked jurisdiction because a public sector labor union's FOI request created an unfair labor practice issue that falls with MERC's exclusive jurisdiction and PERA's dominance in the labor relations field precluded the union's FOI action. The Supreme Court observed that "it would be anomalous indeed if the effect of the PERA were that a union could not obtain public information that was available to all other citizens." The Court, however, agreed that internal investigation records of a law enforcement agency can be exempted from disclosure under the FOIA, MCL 15.243(1); MSA 4.1801(13)(1), and that the employer sufficiently established that public interest favored non-disclosure. The confidentiality of the internal investigation reports was justified on the following grounds: (1) Internal investigations are inherently difficult because employees are reluctant to give statements about the actions of fellow employees; (2) If their statements would be a matter of public knowledge they might refuse to give any statements at all or be less than totally forthcoming and candid; (3) Disclosure could be detrimental to some employees. (4) Public disclosure of records relating to internal investigations into possible employee misconduct would destroy or severely diminish the sheriff departments' ability to effectively conduct such investigations.

Duty to Bargain – Subjects of Bargaining

Grand Rapids Community College Faculty Ass'n v Grand Rapids Community College, 239 Mich App 686 (February 11, 2000). In dismissing an unfair labor practice charge alleging a violation of Section (10)(1)(e) of PERA, both the Administrative Law Judge and MERC found that Grand Rapids Community College's decision to implement a cap on bargaining unit faculty members' total teaching hours involved overtime, a permissive, rather than mandatory subject of bargaining. Overload teaching refers to hours voluntarily assumed by a faculty member during a given semester in addition to his or her normal teaching load. Under a bargained-for allocation

system tied to seniority and full-time status, faculty members were allowed to assume an unlimited number of available overload hours. This allocation resulted in some members assuming in excess of thirty total teaching hours in a semester. In 1995, the employer capped total teaching hours to thirty hours per semester, and for the fall 1995 and spring 1996 semesters, the employer imposed a twenty-nine hour cap. The administrative law judge and MERC found no error in the employer's action. On exceptions, while conceding that the total aggregate number of overload hours to be offered each semester was an issue of economic control within the employer's purview, and thus a permissive subject of bargaining, the union argued that the decision to impose individual restrictions on total teaching hours, affecting the assignment of overload hours, related not to the availability of total overtime, but instead to the *process of distribution* of overtime.

The Court, while finding support in the record for MERC's conclusion that overload hours are in the nature of overtime for purposes of the PERA, observed that the application of a general rule that any and all issues related to overtime, except overtime pay rates, are permissive subjects of bargaining, failed to account for the complexity of the precise question presented. After considering the unique circumstances presented by the use of "overtime" in a collegiate teaching setting, the Court agreed with the union and concluded that because the employer's decision directly impacted application of a bargained-for allocation process by which total available overload hours were distributed, the employer's imposition of a cap on the number of total teaching hours bargaining unit faculty members can accept presented a mandatory subject of bargaining. The Court reversed and remanded the case to MERC to consider additional defenses raised by the employer to the unfair labor practice charge which were not reached since the issue of bargaining status had been found to be dispositive. The Commission's decision is reported at 1998 MERC Lab Op 534.

Administrative Procedures – Res Judicata

Oyo E. Ekpe v Detroit Board of Education and Teamsters Local 214, Docket No. 209651, March 7, 2000, (Unpublished). After Ekpe was discharged from his position as a mechanic, the union filed a grievance that proceeded to arbitration. Ekpe's discharge was upheld. Ekpe then filed a charge with MERC claiming that the union breached its duty of fair representation in handling his grievance. After a hearing, but before a decision was rendered, Ekpe wrote a letter to the administrative law judge stating that he was "dropping the case without prejudice." MERC's director notified the parties that the withdrawal request had been approved and the matter was closed. In another letter responding to the union's request for clarification, the director stated that "both parties had a full opportunity to secure a decision from the commission, which opportunity was waived by the withdrawal. Accordingly, although the withdrawal letter used the term 'without prejudice' the Commission would consider the matter closed."

Ekpe then brought an action in circuit court against the union and the employer. The trial court granted the union's request for summary judgment for Ekpe's failure to serve process. It also dismissed the case against the employer on the ground that the withdrawal of the duty of fair representation charge against the union was "with prejudice" and, therefore, Ekpe would not be able to make the requisite showing of a breach of the union's duty of fair representation in his case against the employer for breach of the collective bargaining agreement. The Court of Appeals upheld summary judgment for the union for Ekpe's failure to serve process, but

reversed the trial court's dismissal of the case against the employer. First, it observed that although Ekpe would be required to prove that the union's representation of him was unfair in his case against the employer, the union was not a necessary party to that case. The Court found that *res judicata* – a prior decision on the merits between the same parties or their privies - should not apply to bar the civil court action because Ekpe's MERC action was not against the employer, and the parties, therefore, were not the same. The Court of Appeals disagreed with the trial court's conclusion that MERC Rule 54(2), which provides for the withdrawal of charges before a final order is issued and upon approval by the administrative law judge, subject to review by the Commission, did not apply. The trial court had reasoned that Ekpe's claim of unfair representation against the union was not a claim of an unfair labor practice.

Moreover, the Court found that the letter from MERC's director stating that the dismissal was "final" and that there would be no determination by the MERC of the validity of Ekpe's claim of unfair representation was not "adjudicatory in nature" because it was not an order nor was it signed by a MERC administrative law judge. The Court also rejected the employer's alternative argument that dismissal was warranted because the employee's discharge was upheld after binding arbitration which was *res judicata* to the present action. The Court, however, found that the arbitrator's decision for the employer would not be grounds to grant summary disposition because an exception to the rule of binding arbitration is created if the contractual process has been seriously flawed by the union's breach of its duty to fairly represent its members. The case against the employer was remanded to the circuit court for further proceeding.

Rules of Evidence – Burden of Proof

Grand Rapids Fire Fighters, Local 366, IAFF v City of Grand Rapids Fire Department, Docket No. 126389, September 1, 2000 (unpublished). MERC affirmed the administrative law judge's dismissal of a March 1997 unfair labor practice charge that alleged a violation of Section 10(1)(c) for the employer's failure to promote bargaining unit member Frank Verburg to captain. The administrative law judge relied, in part, on *County of Tuscola*, 1990 MERC Lab Op 815, where the Commission found no anti-union motivation in a denial of promotion when the parties alleged to have engaged in discrimination were members of the same union as the party allegedly discriminated against. According to the union, by relying on *Tuscola*, the administrative law judge raised the standard for proving anti-union animus as evidenced by her statement that it would be "extremely difficult if not impossible" to do. The union also claimed that because the administrative law judge considered the fact that supervisory and non-supervisory personnel are members of the same bargaining unit, an unfair, enhanced burden has been placed on non-supervisory employees attempting to show discrimination based on anti-union animus. Generally, supervisory public employees are not included in the same bargaining unit as non-supervisory personnel. However, under PERA, MCL 423.213; MSA 17.455(13), fire department supervisors and non-supervisors are placed in the same bargaining unit.

Contrary to the union's assertions, the Court found nothing in the law, beyond the general considerations set forth in the Michigan Administrative Procedures Act (APA), MCL 24.275; MS 3.560(175, that made a distinction as to the weight to be given any piece of evidence, or limit the evidence that may be considered, even in a hearing concerning firefighters. Thus, the Court concluded that MERC properly considered the supervisors' union membership in assessing the union's claim of discrimination based on anti-union animus since "reasonably

prudent men" would "commonly rel[y] upon" this type of evidence in determining this question. The Court also rejected the union's assertion that MERC's decision was not supported by competent, material and substantial evidence on the record. Noting that Verburg was an aggressive and tenacious union president who had participated in several union related activities that involved strong disagreements between Verburg and several supervisors, including the fire chief, who took part in the promotional process, the Court found nothing, except pure speculation, that connected the disagreements that occurred with the motivation behind the promotional decision. The Commission's decision and order is reported at 1998 MERC Lab Op 703.

Discriminatory Discharge – Failure to State a Claim – Failure to Raise Issues Before MERC

Knubbe v Detroit Board of Education and Detroit Federation of Teachers, Docket No. 215333, February 16, 2001 (Unpublished). The Court upheld MERC's dismissal of unfair labor practice charges filed by Knubbe, a tenured teacher, that contended the employer improperly terminated her employment and the union breached its duty of fair representation by refusing to pursue a grievance on her behalf. The Court found that although the charges alleged that the charging party was dismissed out of retaliation, her factual allegations did not establish a nexus between her exercise of rights protected by PERA and the unfair labor practices. Moreover, the Court observed Charging party failed to take advantage of an opportunity to amend her charges to further explain her conclusory allegations. Therefore, the Court agreed with MERC's finding that Knubbe failed to state a claim upon which relief could be granted under PERA. The Court also concluded that none of the other arguments regarding the conduct of the hearing referee, the MERC panel and clerk, attorneys, and parties were raised or considered below and were considered to be waived for appellate review. Charging Party also failed to cite to the record to factually support her allegations and failed to cite any authorities to support her position.

Duty to Bargain – Alter Ego/Joint Employer Status – Unlawful Threats

St. Clair County ISD and Academy for Plastics Manufacturing Technology v St. Clair County Education Association, 2001 Mich. App. LEXIS 81*,* May 2, 2001, (Published). The Court affirmed MERC's finding that the school district violated the PERA by interfering with a school nurse's rights to join the union and to seek union assistance for a salary increase. The Court concluded that although the supervisor did not expressly state that the district would discharge the employee if she joined the union, the supervisor's meaning was clear in conveying to the employee the message that either she could stop her effort to join the bargaining unit and to increase her salary, or she could lose her job. The Court briefly commented on the rocky development of labor unions from their beginning "as a criminal conspiracy" to a familiar cultural institution and observed that "[W]hile this case may not present the most egregious form of coercion, it nevertheless demonstrates how vigilant the law must be."

The Court also affirmed the Commission finding that the academy was not the alter ego of the school district or a joint employer and neither the school district nor the academy was required to bargain with the union on behalf of bargaining unit member who was unilaterally removed from the unit and hired by the academy. Under the Revised School Code and the contract between the school district and the academy, the academy had the ultimate authority to hire, fire, discipline its employees, and determine their wages, benefits, and work schedules.

Although the school district had extensive oversight responsibilities, the Court agreed with Commission that it did not exercise independent control over the academy's employees on a daily basis and to such a pervasive extent that it could reasonable be considered their employer.

The Court also rejected the union's argument that the school district and the academy should be considered joint employers because PERA is the primary vehicle for defining employees' rights to organize and the public school academies legislation in the Revised School Code (RSC), MCL 380.501 *et seq.;* MSA 15.4501 *et seq.,* conflicts with PERA. According to the Court, the union did not point to any explicit provision in the RSC that allegedly conflicted with PERA and failed to recognize that even with the supervisory role the school district retained, it gave up a significant amount of control and authority by transferring its metal machine program.

Finally, the Court found that the Commission did not abuse its discretion by denying the union's request to reopen the record to introduce evidence that the ISD moved its electromechanic/hydraulics program to the Academy in August 1998. The Court observed that although the union was unable to present the evidence at the original hearing because the event had not occurred, reopening the record is discretionary. Moreover, the Court found that the evidence would not be enough to prove that the ISD and the Academy were joint employers, and, in turn, have any effect on the administrative proceeding.